STATE OF MICHIGAN

COURT OF APPEALS

NANCY SHANKS, Plaintiff-Appellant,	UNPUBLISHED April 17, 2012
v	No. 302725 Wayne Circuit Court
MORGAN & MEYERS, P.L.C., JEFFREY T. MEYERS, and SCOTT W. ROONEY, Defendants-Appellees.	LC No. 10-000895-NM

NANCY SHANKS, Plaintiff-Appellant,	
v	No. 302726 Wayne Circuit Court
SCOTT W. ROONEY, Defendant-Appellee.	LC No. 10-008337-NM

Before: BORRELLO, P.J., and JANSEN and GLEICHER, JJ.

PER CURIAM.

After sustaining a closed head injury in an automobile accident, plaintiff Nancy Shanks retained attorneys Jeffrey T. Meyers, Scott W. Rooney, and their law firm, Morgan & Meyers, P.L.C. Rooney filed an automobile negligence lawsuit on Shanks' behalf. While her accident case remained pending, Shanks entered into three litigation funding contracts and received cash advances totaling $150,000. After the matter resolved, the funding companies demanded repayment of more than double that amount, but eventually agreed to accept a reduced sum. Shanks then sued her attorneys, asserting claims for legal malpractice and breach of fiduciary duties. She alleged that Rooney had encouraged her to enter into an illegal and usurious litigation funding contract and negligently failed to pursue appointment of a conservator due to her closed head injury. The circuit court granted summary disposition in defendants' favor finding that Shanks possessed sufficient mental capacity to enter into the litigation funding contracts and that defendants had not breached any fiduciary duties. We affirm, albeit for somewhat different reasons.

I. UNDERLYING FACTS AND PROCEEDINGS

On August 27, 2004, a vehicle driven by Harley Ralph Siebert rear ended Shanks' Chevy Tahoe. Shanks was evaluated in an emergency room and diagnosed with post-traumatic cervical and back strain. Subsequently, she experienced memory problems, anxiety, agitation, panic attacks, and exacerbation of her preexisting depression. Rooney filed an automobile negligence complaint on Shanks' behalf, naming as defendants Siebert and Siebert's employer, Star Sales. Siebert and Star Sales failed to answer the complaint, and the circuit court entered a default judgment for $950,000 in Shanks' favor. The defaulted parties then claimed an appeal in this Court.[1]

Meanwhile, on July 10, 2007, Shanks entered into a litigation funding contract with Cambridge Management Group, L.L.C. (CMG). The contract stated that Shanks "does not have sufficient funds to pay for the necessities of life or medical care and requires an advance of funds." Under the terms of the contract, CMG loaned Shanks $100,000. Shanks agreed that when her lawsuit settled, her counsel would pay to CMG the principal in the amount of $100,000, fees amounting to $525, and interest according to the following formula:

> In the event that there is a recovery of money and payment is received by CMG on or before 1/10/2008, then CMG will accept as a Total Fee and return on the investment the sum of $134,636.15, which includes a fee of 4.99% of $100,525.00 per month from 7/10/2007 compounded monthly. In the event that there is a recovery of money and payment is received by CMG after 1/10/2008, then CMG will accept as a Total Fee and return on the investment the sum of $134,636.15 plus 4.99% of $134,636.15 per month, compounded monthly, for each and every thirty day period following 1/10/2008. Plaintiff's Attorney shall contact CMG prior to disbursing the Funds, for a current Total Fee and return on the investment of CMG.

On December 10, 2007, Shanks signed a second contract with CMG, advancing another $25,000. And in March 2008, Shanks signed a litigation funding agreement with a company called Interim Funding, obtaining an additional $25,000.

At her deposition, Shanks testified that Rooney "told me to take out this advance in the beginning," "planted the thought in my head repeatedly," and referred her directly to CMG. Shanks admitted locating Interim Funding on her own, and further conceded that she had unsuccessfully sought additional advances from other third-party lending companies she found on the Internet. Shanks used some of the money to buy furniture and vehicles, and claims that

[1] Siebert's appeal was dismissed by stipulation of the parties. *Shanks v Siebert*, unpublished order of the Court of Appeals, entered October 28, 2008 (Docket No. 279258).

someone at her bank stole a portion of it. Defendants never requested that Shanks contribute any of the advanced funds toward the costs of her litigation.[2]

In October 2008, Shanks agreed to settle her automobile negligence case for $625,000. CMG and Interim Funding claimed liens totaling $325,819.26. By negotiating with the funding companies, Meyers trimmed the liens by approximately $64,000. Shanks authorized defendants to resolve her potential claims against CMG and Interim Funding for the reduced amounts.

In January 2010, Shanks filed suit against defendants, asserting claims for legal malpractice and breach of fiduciary duty.[3] Defendants moved for summary disposition under MCR 2.116(C)(10), contending that Shanks could not establish that she lacked mental competence to enter into the funding agreements or that defendants' conduct proximately caused her to obtain the advancements. Defendants further asserted that attorneys lack any duty to prevent a client from making poor financial choices, and that Shanks' claims for breach of fiduciary duty were subsumed within her legal malpractice allegations. Defendants supported their summary disposition motion with numerous exhibits, which we discuss in greater detail *infra*.

In response to defendants' summary disposition motion, Shanks presented a 2007 report and affidavit signed by Dr. William C. Bucknam, a neuropsychiatrist who examined her in conjunction with her negligence claim, an unsigned affidavit purportedly authored by Bucknam in 2011, her testimony at the default judgment hearing, excerpts of her deposition testimony, and an affidavit signed by attorney Kenneth M. Mogill averring in relevant part:

> [I]f the facts of this matter establish that during the course of representing Ms. Shanks, her attorney became aware of her inability adequately to protect her own financial interests and further establish that the attorney failed to take reasonable steps to protect Ms. Shanks' financial interests, the failure to take reasonable steps in those circumstances would constitute a violation of the attorney's duty to Ms. Shanks as set out in MRPC 1.14(b), the Comment to MRPC 1.14(b), and other authorities cited above.[4]

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[2] After filing the instant lawsuit, Shanks contacted yet another lender who denied her a loan.

[3] Shanks apparently failed to serve Rooney within the life of the summons and filed a new, separate action against him. The circuit court granted summary disposition in both cases, and this Court consolidated the actions.

[4] MRPC 1.14 governs the representation of disabled clients as follows:

> (a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability

Mogill's affidavit did not address whether defendants bore any duty to advise Shanks against entering into the litigation funding contracts.

The circuit court granted defendants' motion, reasoning:

> [T]he court is satisfied that it's apparent that she has a good understanding of her financial affairs, including the transactions that were made[,] for how much[,] the dates. More importantly, she testified that she understood that she was getting the money from these litigation funding companies, and that interest would be applied, and the money would be paid back at the time of her settlement and/or jury verdict, if there was one. There is no evidence to support the argument that the plaintiff has met the high standards, which is an odd standard of establishing that she did not have "a reasonable perception of what the litigation funding agreements involved."
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> Finally, concerning the breech [sic] of fiduciary duty claim. The Court of Appeals has held the fiduciary duty claim differs from a legal malpractice, because the conduct requires a constituted breech [sic] of fiduciary duty which requires a more culpable state of mind than the negligence. The court is satisfied there is no evidence of a culpable state of mind.

II. ANALYSIS

A. STANDARD OF REVIEW

Shanks contests the circuit court's summary disposition ruling. We review de novo a circuit court's summary disposition ruling. *Robertson v Blue Water Oil Co*, 268 Mich App 588, 592; 708 NW2d 749 (2005). A motion brought under MCR 2.116(C)(10) "tests the factual support of a plaintiff's claim." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh*, 263 Mich App at 621. "A genuine issue of material fact exists when the record, giving the benefit of

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> or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
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> (b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.

reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West*, 469 Mich at 183.

B. LEGAL MALPRACTICE CLAIM

To establish a legal malpractice claim, a plaintiff must prove "'(1) the existence of an attorney-client relationship; (2) negligence in the legal representation of the plaintiff; (3) that the negligence was a proximate cause of an injury; and (4) the fact and extent of the injury alleged.'" *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995), quoting *Coleman v Gurwin*, 443 Mich 59, 63; 503 NW2d 435 (1993). Negligence occurs when the attorney violates his duty "to use reasonable skill, care, discretion and judgment in representing a client." *Id.* at 656. Shanks' brief on appeal asserts, "the real and central issue is whether Defendants, as Plaintiff's former attorneys and fiduciaries, were aware of, or should have been aware of her mental difficulties and took all reasonable precautions to protect her." She argues that Rooney and Meyers breached their duties of reasonable care by (1) putting Shanks in touch with the litigation funding companies, (2) encouraging her to borrow from them, (3) failing to discourage her from entering into "usurious" loans that are "criminal in nature," and (4) failing to protect Shanks "by way of a court appointed conservator or other appropriate fiduciary."

We first address Shanks' competency to enter into the litigation funding contracts. This Court has adopted the following analysis applicable in determining mental competence to contract:

> The test of mental capacity to contract is whether the person in question possesses sufficient mind to understand in a reasonable manner the nature and effect of the act in which the person is engaged. To avoid a contract it must appear not only that the person was of unsound mind or insane when it was made, but that the unsoundness or insanity was of such a character that the person had no reasonable perception of the nature or terms or the contract. . . . A mentally incompetent person is one who is so affected mentally as to be deprived of sane and normal action. A person may be incapable of conducting his business successfully and still not be mentally incompetent. [*In re Erickson Estate*, 202 Mich App 329, 332-333; 508 NW2d 181 (1993).]

Preliminarily, we note that Shanks has never been adjudicated mentally incompetent, "of unsound mind or insane." Nor does any record evidence suggest that her counsel in this legal malpractice action has requested appointment of a guardian or conservator.

In support of their summary disposition motion, defendants produced a 2006 neuropsychological report signed by Suzanne Gilligan Dickson, Ph.D., and Barbara Wolf, Ph.D. Drs. Dickson and Wolf interviewed Shanks and tested her abilities on a wide range of standard neuropsychological tests. The testing revealed "mild deficits in aspects of verbal memory and visual memory, executive functioning, and auditory working memory." Shanks scored in an "intact" range "on tests of basic attention/concentration, processing speed, visuospatial skills, basic language skills, and motor skill." The doctors concluded, "The results of the evaluation are not consistent with a diagnosis of dementia or even mild cognitive impairment at this time."

Once defendants submitted this evidence, the burden shifted to Shanks to show a genuine issue of disputed fact regarding her competence. See *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The circuit court correctly determined that none of the evidence Shanks supplied demonstrated that she lacked the ability to understand the nature or terms of the litigation funding contracts.

Shanks testified at the default judgment hearing that after the accident, she had "problems with my memory, like emotional outbursts, um, like seizures, um, a lot of excruciating back pain, pains in my legs, my feet, um, neck pain." She claimed difficulty in counting, but described no other mental deficits. Although Shanks claimed at her deposition that she was a "vulnerable adult," she adamantly rebuffed the notion that she needed a guardian other than her son, asserting: "I'm afraid of being assigned a guardian where they would be controlling me for the rest of my life and then we'll be fistfighting out on the front lawn literally." Shanks admitted that Dr. Bucknam never told her she needed a guardian.

In a lengthy report written at the time defendants represented Shanks, Bucknam opined that Shanks had sustained a "minor traumatic brain injury" manifested by "variability in attention and concentration, and impairment of executive functioning, memory and visual construction." Bucknam recommended that Shanks receive language pathology and occupational therapy, psychiatric treatment, and medication. His primary diagnostic impression was "organic affective disorder, distressed." Bucknam's report included no test results or other information supporting that Shanks qualified as incompetent to enter into a contract.

Bucknam averred in an unsigned affidavit that Shanks "was not competent to make or understand major financial decisions and not competent to enter into legally binding contracts since the date of her accident and beyond." At the summary disposition hearing Shanks' counsel asserted that he had obtained a signed version of the affidavit. However, the circuit court record does not include a signed affidavit, and counsel has not filed a signed copy with this Court. An unsigned affidavit cannot create a material issue of fact and thereby defeat summary disposition. *Prussing v Gen Motors Corp*, 403 Mich 366, 369-370; 269 NW2d 181 (1978). MCR 2.114(C)(2) provides that "[i]f a document is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party." Given that Shanks never submitted a signed version of Bucknam's 2001 affidavit, we decline to consider it.

In summary, the evidence offered by Shanks fails to raise a material question regarding her competence to enter into the litigation funding contracts. Thus, her claim that defendants committed legal malpractice by failing to pursue appointment of a conservator or fiduciary must fail.

The essence of Shanks' remaining legal malpractice claims is that Rooney encouraged her to enter into an "illegal and usurious contract." Viewing the evidence in Shanks' favor, we will assume without deciding that the rate of interest charged by CMG qualified as usurious

under relevant law.[5] "Pursuant to MCL 438.31 and MCL 438.32, the maximum lawful annual interest rate is seven percent and lenders that charge interest in excess of that rate are barred from recovering any interest, late fees, or attorney fees, and the borrower is entitled to recover his attorney fees from the lender." *Lawsuit Fin, LLC v Curry*, 261 Mich App 579, 590; 683 NW2d 233 (2004). Bearing that assumption in mind, we consider whether defendants bore a duty to refrain from encouraging Shanks to enter the contracts, or to actively dissuade her from so doing.

Shanks presented no expert testimony supporting these components of her legal malpractice claim. Generally, expert testimony is required to establish an attorney's standard of care. *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 48; 436 NW2d 70 (1989). However, "[w]here the absence of professional care is so manifest that within the common knowledge and experience of an ordinary layman it can be said that the defendant was careless, a plaintiff can maintain a legal malpractice action without offering expert testimony." *Id.* The complex "legal and ethical challenges associated with litigation loan agreements," as described in detail in McLaughlin, *Litigation funding: Charting a legal and ethical course*, 31 Vt Law Rev 615 (2007), fall well outside the realm of a layperson's ordinary experience. Absent any expert testimony regarding the appropriate standard of care, summary disposition of these allegations was appropriate.[6]

Shanks grounded her breach of fiduciary duty claims on precisely the same conduct identified as giving rise to her legal malpractice allegations. The nature and extent of an attorney's fiduciary duties to a client are neither obvious nor within the common experience. Shanks alleges that defendant failed to adequately represent her interests in the automobile negligence case rendering this a claim "for malpractice and malpractice only." *Barnard v Dilley*,

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[5] Defendants failed to address whether the funding contracts qualify as usurious. Shanks' briefing of this issue is minimal at best. Neither of the parties addressed whether the loan was usurious under New Jersey law, which the CMG contract declares "control[s] the interpretation of this Agreement."

[6] This Court has held that an attorney bears no duty to dissuade a client from choosing an incompetent or dishonest agent. *Persinger v Holst*, 248 Mich App 499, 507-508; 639 NW2d 594 (2001). This Court explained:

> A mentally competent principal has the superior knowledge and ability to choose an agent that best meets her expectations, needs, and desires. The responsibility to make such a decision cannot be conveniently denied and the burden shifted because the principal made a poor choice. [*Id.* at 508.]

We decline to officially extend *Persinger* to the circumstances presented in this case in the absence of briefing or expert testimony, but note that it is a useful comparison.

134 Mich App 375, 378-379; 350 NW2d 887 (1984). Shanks cannot avoid the expert testimony requirement by labeling her claim as a breach of fiduciary duty rather than legal malpractice.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Elizabeth L. Gleicher